



September 29, 2023

VIA ELECTRONIC SUBMISSION

The Honorable Brenda Mallory
Chair
White House Council on Environmental Quality
730 Jackson Place, NW
Washington, DC, 20503

Re: National Environmental Policy Act Implementing Regulations Revisions Phase 2, Docket No. CEQ-2023-0003.

Dear Chair Mallory:

On July 31, the Council on Environmental Quality (CEQ) published a proposed rule titled “National Environmental Policy Act Implementing Revisions Phase 2.”¹ This letter constitutes the Office of Advocacy’s (Advocacy) public comments on the proposed rule.

Advocacy is concerned that CEQ’s proposed rule will impact small entities by increasing delays and compliance costs on their projects. The proposed rule also makes compliance with the changes to NEPA included in the June 2023 Fiscal Responsibility Act more difficult. Additionally, Advocacy believes new mitigation requirements outlined in the proposed rule are potentially duplicative of those in other environmental statutes. Finally, Advocacy encourages CEQ to consider comments received on its January 2023 guidance on consideration of greenhouse gas (GHG) emissions in NEPA reviews before incorporating it into the proposed rule.

I. Background

A. The Office of Advocacy

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA). As such, the views expressed by Advocacy do

¹ 88 Fed. Reg. 49,924 (July 29, 2023).

not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),² as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),³ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, the RFA requires federal agencies to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.⁴ The agency must include a response to these written comments in any explanation or discussion accompanying the final rule's publication in the *Federal Register*, unless the agency certifies that the public interest is not served by doing so.⁵

Advocacy's comments are consistent with Congressional intent underlying the RFA, that "[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public."⁶

B. The Proposed Rule

CEQ is proposing multiple revisions to the NEPA process. This is the second set of revisions to NEPA since 2020. "Phase 1," which was finalized on April 20, 2022, expanded the definition of "effects" that federal agencies must consider when formulating an environmental assessment (EA) or an environmental impact statement (EIS).⁷ It also allowed federal agencies to promulgate more stringent regulations implementing NEPA than those promulgated by CEQ.⁸ Both sets of NEPA revisions are in response to E.O. 13990, "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis,"⁹ which directed agencies to review regulations issued between January 20, 2017 and January 20, 2021.

The "Phase 2" proposed rule makes a variety of changes to the existing NEPA process, including adding requirements to consider climate change and environmental justice when conducting project reviews. Additionally, CEQ proposes changes to NEPA's public participation process and considers reforms aimed at increasing transparency in the review process. Finally, CEQ implements changes made to NEPA in the Fiscal Responsibility Act,¹⁰ including time and page limits for NEPA documents.

² 5 U.S.C. §601 et seq.

³ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. §601 et seq.).

⁴ Small Business Jobs Act of 2010 (PL. 111-240) §1601.

⁵ *Id.*

⁶ *Id.*

⁷ National Environmental Policy Act Implementing Regulations Revisions, 87 Fed. Reg. 23,453 (Apr. 20, 2022).

⁸ *Id.*

⁹ 86 Fed. Reg. 7,037 (Jan. 25, 2021).

¹⁰ Pub. L. No. 118-5, tit. III, 137 Stat. 38 (2023).

II. Advocacy's Small Business Concerns

Advocacy held a roundtable on September 13, 2023, to discuss issues raised by CEQ's proposed rule. In attendance were small businesses and their representatives. In addition, multiple small business stakeholders have contacted Advocacy to discuss the proposal. While CEQ's changes to the NEPA process must be implemented by federal agencies, they impact small entities. If enacted, these proposals will modify existing NEPA review and approval requirements for federal actions.

Advocacy is concerned these modifications will result in increased compliance costs and delays for projects involving small entities. Additionally, the proposed rule could turn a traditionally neutral NEPA review process into one which favors certain types of projects over others. Advocacy is also concerned that new mitigation requirements in CEQ's proposal duplicate existing requirements in other statutes, such as the Endangered Species Act and Clean Water Act. Small businesses were also concerned that many of the changes proposed by CEQ run counter to the intent of the Fiscal Responsibility Act.

A. CEQ's Proposed Changes to NEPA Will Impact Small Entities by Ignoring the Statute's Procedural Nature.

CEQ has certified that the proposed rule would not have a significant impact on a substantial number of small entities because it will "apply to federal agencies and set forth the process for their compliance with NEPA."¹¹ However, the changes CEQ proposes to make to NEPA would transform the statute from one which outlines the process by which federal agencies evaluate their actions into one which contains regulatory requirements directly impacting small entities who work on federal projects.

NEPA is a procedural statute that lays forth the method by which agencies evaluate the environmental impacts of their actions. However, CEQ "is proposing to remove the language that describes NEPA as a purely procedural statute because, while correct, CEQ considers that language to be an inappropriately narrow view of NEPA's purpose."¹² Small entities are concerned that expanding NEPA beyond its intended procedural nature could create undue preferences for certain types of projects over others. Such a concept would exceed CEQ's existing authority and impact small entities by increasing the costs and regulatory burdens incurred on associated projects they work on in multiple economic sectors, including energy, mining, infrastructure, and agriculture.

As a procedural statute, NEPA is supposed to ensure a neutral review of all projects it covers. NEPA should not be seen as influencing a particular outcome or alternative. However, in multiple instances, the Phase 2 rule highlights certain types of projects while remaining silent, or possibly casting doubt upon others. For example, CEQ advises that "an agency should consider short-term construction related GHG emissions from a renewable energy project in light of long-term reductions in GHG emissions when determining the overall intensity of effects" and "a forest restoration project may have a short-term adverse effect to a species by displacing it from

¹¹ 88 Fed. Reg 49,964 (July 29, 20203).

¹² *Id.* at 49,930.

the area while the project is carried out but have long-term beneficial effects to the species by reducing the risk that a severe wildfire will destroy the habitat altogether.”¹³

On the other hand, the proposed rule also states that “leases for oil or gas extraction or natural gas pipelines have local effects, but also have reasonably foreseeable global indirect and cumulative effects related to GHG emissions.”¹⁴ Additionally, CEQ discusses NEPA reviews on federal loan programs by noting “if a Federal agency operates a loan guarantee program, the agency may have discretion in the types of activities to which it might issue a loan guarantee. A NEPA review that analyzes the environmental effects of potential project types could help inform how the agency designs the program.”¹⁵

Small entities, during Advocacy’s roundtable and in separate discussions, expressed a concern that these statements and others in the proposed rule outline one set of requirements for renewable energy and restoration projects and another for oil and natural gas projects. Similarly, small entities were concerned with evaluating federal loan programs not on the process of the loan program itself, but what types of projects they might fund. NEPA is not a statute designed to influence outcomes or express a preference for one type of project over another. Rather it is intended to establish one review process to be used to evaluate all federal actions and/or projects.

In the recent *West Virginia v. EPA* decision, the Supreme Court rejected the Environmental Protection Agency’s (EPA) argument that Congress conferred on it the ability to force power plants to switch to natural gas production and forego coal, stating that “there is little reason to think Congress assigned such decisions to the Agency.”¹⁶ Here, the same reasoning stands. NEPA does not give CEQ, or any federal agency, the authority to prefer any one type of project over another, but rather to ensure they are all appropriately reviewed using the same set of rules.

Based on feedback from small entities, Advocacy recommends CEQ reconsider the proposed Phase 2 rule and revise it in a manner consistent with the boundaries of NEPA.

B. New Mitigation Requirements in CEQs Proposed Rule Duplicate Existing Regulations and Impose Additional Costs on Small Entities.

CEQ’s proposal increases mitigation requirements throughout the NEPA review process. Specifically, the proposal adds language “clarifying that any mitigation requirements must be enforceable, such as through permit conditions or grant agreements”¹⁷ and encouraging agencies “to incorporate, where appropriate, mitigation measures addressing a proposed action’s significant adverse human health and environmental effects that disproportionately and adversely affect communities with environmental justice concerns.”¹⁸ Additionally, CEQ seeks to require mitigation plans for both “significant effects” and “reasonably foreseeable effects” of proposed

¹³ *Id.* at 49,936 (July 31, 2023).

¹⁴ *Id.* at 49,935.

¹⁵ *Id.* at 49,962.

¹⁶ *W. Virginia v. Env’t Prot. Agency*, 142 S. Ct. 2587, 2612 (2022).

¹⁷ 88 Fed. Reg. at 49,953.

¹⁸ *Id.* at 49,953-54.

actions.¹⁹ CEQ also proposes to delete language stating that “NEPA does not mandate the form or adoption of any mitigation” because it views the language as “unnecessary.”²⁰ Unfortunately, the text of the rule indicates the opposite.

As already discussed, NEPA is a procedural statute that creates a structure for project reviews. It is not intended to force specific actions, such as mitigation. Additionally, the Regulatory Flexibility Act requires agencies to consider duplicative or overlapping regulations when proposing rules.²¹ Mitigation is already required under multiple federal statutes, including the Clean Water Act (CWA)²² and the Endangered Species Act (ESA).²³ Imposing additional mitigation in NEPA is duplicative and adds unnecessary costs to small entities who must meet these new regulatory requirements. In fact, the Office of Advocacy just recently raised concerns with proposed changes to the ESA which could unnecessarily broaden existing mitigation requirements.²⁴ With multiple statutes already requiring mitigation, it is important that these requirements act in harmony with one another, rather than becoming an unnecessary cumulative impact upon small entities.

CEQ acknowledges costs as well as requirements in other environmental statutes in its Regulatory Impact Assessment, noting that the proposed rule’s mitigation requirements “may result in incremental additional costs” but that such costs are “challenging to assess, given that mitigation often depends on an agency’s other authorities or compliance with other environmental laws.”²⁵

Advocacy recommends CEQ eliminate its proposed expansion of mitigation requirements in the NEPA process.

C. CEQ Must Fully Consider Comments on its “National Environmental Policy Act Guidance on the Consideration of Greenhouse Gas Emissions and Climate Change”²⁶ Prior to Incorporating Any Portion of It into a Final Rule.

In the proposed rule, CEQ invites public comment on incorporating some or all of its January 9, 2023 guidance on how to consider greenhouse gas (GHG) emissions in NEPA reviews.²⁷ Earlier this year, CEQ took comment on this guidance through April 10. Currently 377 comments are in

¹⁹ Id. at 49,954.

²⁰ Id. at 49,963.

²¹ 5 U.S.C. §603(b)(5).

²² See generally 33 U.S.C. §1344.

²³ See generally 16 U.S.C. §1537.

²⁴ See U.S. Small Bus. Admin., Off. of Advocacy, Comment Letter on Proposed Rules for Endangered and Threatened Wildlife and Plants; Revision of Regulations for Interagency Cooperation, Endangered and Threatened Wildlife and Plants; Listing Endangered and Threatened Species and Designating Critical Habitat, Endangered and Threatened Wildlife and Plants; Regulations Pertaining to Endangered and Threatened Wildlife and Plants (Aug. 21, 2023), <https://www.regulations.gov/comment/FWS-HQ-ES-2021-0104-100278>.

²⁵ Council on Env’t Quality, *Regulatory Impact Analysis for the Proposed Rule, Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act*, RIN: 0331-AA07, 20 (July 2023), <https://www.regulations.gov/document/CEQ-2023-0003-0003> [hereinafter *Regulatory Impact Analysis*].

²⁶ Council on Env’t Quality, *Guidance on Consideration of Greenhouse Gases*, https://ceq.doe.gov/guidance/ceq_guidance_nepa-ghg.html (last visited Sept. 27, 2023).

²⁷ 88 Fed. Reg. 49,945 (July 31, 2023).

the docket,²⁸ some submitted by small entities and associations that represent them. Proper examination of these comments could impact the substance of CEQ's guidance.

Advocacy recommends CEQ fully consider these comments and make any appropriate changes to the January 9, 2023 guidance prior to incorporating any portion of it into a final rule.

D. The Proposed Rule Will Impede Federal Agencies' Ability to Comply with the NEPA Time and Page Limits Required in the Fiscal Responsibility Act.

On June 3, 2023, the Fiscal Responsibility Act of 2023 (FRA) was signed into law.²⁹ Section 321 of the FRA sets a time limit of two years for an EIS and one year for an EA. Additionally, the law sets a limit of 200 pages for an EIS and 75 pages for an EA. In speaking with multiple small entities about the "Phase 2" proposed rule, small entities identified achieving these critical reforms to NEPA as a priority. The time and page limits will help provide clarity and predictability to the NEPA review process.

Unfortunately, multiple provisions in the "Phase 2" proposed rule will make achieving the FRA's time and page limits more difficult. According to CEQ's own data, the average time to complete an EIS is 4.5 years.³⁰ This is more than twice as long as the requirement set by the FRA. Additionally, in speaking with small entity representatives in the mining sector, Advocacy was told that an EIS can take anywhere from 7-10 years. One industry representative explained that they were working on a project where the supplemental EIS was actually taking longer than the original EIS. Additionally, Advocacy was told that EAs of 2-4 years were not uncommon.

Delays of this length directly impact small entities by raising project costs as well as hindering the ability to attract investment in future projects. Small entity representatives expressed to Advocacy that the current length of the NEPA review process impedes their ability to take on debt to help finance a project because investors are encouraged to wait out the length of the project reviews before becoming involved.

As proposed, CEQ's Phase 2 rule adds time to the NEPA process as opposed to find ways to make it more efficient. New requirements to consider climate change and environmental justice are subjectively defined and could lead to increased opportunities for project litigation. CEQ acknowledges that litigation costs are "large," "non-trivial," and "unpredictable, as cases may take many years to be resolved in the courts."³¹ These lawsuits and their associated costs can cause projects to be delayed or abandoned altogether, directly impacting small entities who work on them.

²⁸ See Comments on National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change, REGULATIONS.GOV, <https://www.regulations.gov/docket/CEQ-2022-0005/comments> (last visited Sept. 27, 2023).

²⁹ Pub. L. No. 118-5, tit. III, 137 Stat. 38.

³⁰ See Exec. Off. of the President, Council on Env't Quality, *Fact Sheet: CEQ Report on the Length of Environmental Impact Statements (2013-2018)*, https://ceq.doe.gov/docs/nepa-practice/CEQ_EIS_Length_Fact_Sheet_2020-6-12.pdf. (updated June 2020).

³¹ *Regulatory Impact Analysis*, *supra* note 24, at 11.

Advocacy recommends CEQ reconsider the Phase 2 rule in light of the goals of the FRA and focus on changes to the NEPA process which will help to attain those goals.

III. Conclusion

Advocacy is concerned with the changes included in the Phase 2 proposed rule. As written, they will change NEPA from a procedural statute designed to ensure an equal and thorough review of federal actions and projects into a vehicle for preferring some projects over others. This will impact small entities who need a fair and impartial review process to ensure the projects they work on can proceed without unnecessary cost and delay. Advocacy recommends CEQ reconsider the Phase 2 proposed rule and focus on preserving the procedural nature of NEPA and fulfilling the goals of the bipartisan FRA.

If you have any questions or require additional information, please contact me or Assistant Chief Counsel Nick Goldstein at (202) 772-6948 or by email at nick.goldstein@sba.gov.

Sincerely,

/s/

Major L. Clark, III
Deputy Chief Counsel
Office of Advocacy
U.S. Small Business Administration

/s/

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U.S. Small Business Administration

Copy to: Richard L. Revesz, Administrator
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